THE ALIEN TORT STATUTE IN THE UNITED STATES: U.S. COMPLIANCE WITH INTERNATIONAL LAW NORMS FOLLOWING *NESTLÉ V. DOE*

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I. INTRODUCTION

In July 2021, the Supreme Court gave its verdict on *Nestlé USA, Inc. v. Doe* (hereinafter *Nestlé*), its most recent case involving a claim under the Alien Tort Statute (ATS).[1] In *Nestlé*, six Malian plaintiffs alleged that they were trafficked into the Ivory Coast as child slaves to work on farms from which the defendant corporations (Nestlé, Cargill, et al.) sourced their cocoa.[2] The plaintiffs asserted a cause of action under the ATS, claiming that this corporate activity equated to aiding and abetting child slavery as these companies were aware, or should have been aware, that the farms were exploiting enslaved children, and that the defendant corporations made all major operational decisions within the United States. Section 1350 of the ATS grants federal courts jurisdiction to hear claims brought by a foreign plaintiff for a "tort only, committed in violation of the law of nations or a treaty of the United States."[3] The Court, in line with prior case holdings that have interpreted the ATS narrowly, ruled in favor of the defendants, finding that the claim brought by the foreign plaintiffs did not meet the requirements needed to find liability under the ATS.[4]

By taking a narrow interpretation of the ATS, the Court has continued its practice of avoiding, when possible, substantive decisions that pertain to violations of international norms.[5] This is an extension

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1. 28 U.S.C. § 1350 (2020).

2. Nestle USA, Inc. v. Doe, 141 S. Ct. 1931 (2021).

3. 28 U.S.C. § 1350.

4. Nestle, 141 S. Ct. at *5.

5. *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (holding that under ATS's "narrow scope" the violation must be "universal, definable, and obligatory" in response to plaintiff's request that the prohibition of torture be extended to a non-state actor and that terrorism be recognized as a violation of the law of nations); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987) (finding that plaintiffs met their burden for showing an international consensus for the international tort of "causing disappearance" but were unable to

of the long-standing trend of U.S. courts' treatment of international law as persuasive rather than binding, especially when it is in conflict with U.S. interests or domestic law.[6] However, this recent decision has been controversial because of the broad implications it has for corporate governance and supply-chain compliance in the context of international human rights violations.

In 2001, well before this case had been decided, Professor William Dodge of University of California, Davis School of Law, in his article *Which Torts in Violation of the Law of Nations?*, argued that courts should interpret the ATS more broadly to permit plaintiffs to bring claims as a result of violations of customary international law.[7] Specifically, Dodge argued that courts have a duty to exercise jurisdiction and impose liability under the ATS if plaintiffs can "prove the existence of a customary international law rule resulting from 'a general and consistent practice of states followed by them from a sense of legal obligation' and can prove that the corporate defendants have committed torts in violation of such a rule."[8]

Despite this argument, the case law of the intervening decades has taken a different approach. The Court has continued to read the statute narrowly, permitting defendant corporations to withstand claims of aiding and abetting foreign governments in various human rights violations. Following *Nestlé*, however, there has been renewed interest and discourse over whether a broader reading of the ATS is necessary.[9]

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establish an international consensus for what conduct constitutes "cruel, inhuman or degrading treatment"); Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1304 (C.D. Cal. 2000); Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2761 (2004) (plaintiff asked the court to recognize forced labor as a violation of the law of nations and to enforce that law against a domestic corporation; dismissing complaint because plaintiff was unable to prove that the court had personal jurisdiction over corporate foreign defendant).

6. MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 11-12 (2010), https://www.gc.noaa.gov/documents/gcil_cong_RL32528.pdf.

7. *See* William S. Dodge, *Which Torts in Violation of the Law of Nations?*, 24 HASTINGS INT'L L. & COM. L. REV. 351 (2001) (arguing for a broader interpretation of the Alien Tort Statute).

8. *Id.* at 360 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (AM. LAW INST. 1987)).

9. *See, e.g.*, Terry Collingsworth, Nestlé & Cargill v. Doe *Series: Meet the "John Does"- the Children Enslaved in Nestlé & Cargill's Chain*, JUST SECURITY (Dec. 21, 2020) https://www.justsecurity.org/73959/nestle-cargill-v-doe-series-meet-the-john-does-the-children-enslaved-in-nestle-cargills-supply-chain/; William S. Dodge, *The Surprisingly Broad Implications of* Nestlé USA Inc. v. Doe *for Human Rights Litigation and Extraterritoriality*, JUST SECURITY (June 18, 2021), https://www.justsecurity.org/77012/the-surprisingly-broad-implications-of-nestle-usa-inc-v-doe-for-human-rights-litigation-and-extraterritoriality/.

This paper explores how U.S. courts have dealt with cases brought under the ATS, relying primarily on Dodge's interpretation of the judicial treatment of the statute from its inception up until the Supreme Court's landmark decision in *Sosa v. Alvarez-Machain* in 2004. After examining these past and current trends, this paper turns to a discussion of the implications of *Nestlé*'s holding for the United States' compliance with international norms and whether the trend will continue.

II. WILLIAM S. DODGE: AN ARGUMENT FOR EXPANDING THE ALIEN TORT STATUTE

A. *"First Wave" ATS Claims*

In Dodge's 2001 paper, he argues for the expansion of the Alien Tort Statute to incorporate customary international law,[10] as opposed to restricting it to violations of the laws of nations under one of the three historical torts mentioned in *Sosa*: offenses against ambassadors, violation of safe conducts, and piracy.[11] He describes how U.S. courts have interpreted the ATS, beginning with the seminal Second Circuit case *Filártiga v. Peña-Irala*, decided in 1980.[12] In *Filártiga*, the Second Circuit recognized the right of foreign victims of international human rights violations to sue malfeasors in U.S. federal courts, even if the act took place extraterritorially, as long as the court had personal jurisdiction over the defendant.[13] Many legal scholars have called this the "first wave" of ATS claims.[14] During this period, courts saw foreign plaintiffs bring claims against individual foreign defendants.[15] Subsequently, the 1990s saw a "second wave" of ATS suits, with claims brought against large, multinational corporations who, due to their more easily accessible assets, proved to be much more attractive defendants.[16] These defendant corporations were typically accused of aiding and abetting foreign governments in violations of customary international law, such as forced labor, environmental torts, and "cultural genocide."[17]

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10. Dodge, *supra* note 7, at 359.

11. Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004).

12. Dodge, *supra* note 7, at 351 (referencing Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980)).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 351-52 (citing Beanal v. Freeport-McMoran Inc., 197 F.3d 161, 168 (5th Cir. 1999)).

B. *"Second Wave" ATS Claims*

During the second wave, U.S.-based corporations found themselves increasingly subject to suit and, relying in part on the arguments made by academic critics of the statute, sought a "corporate defense bar," or a judicial determination that the ATS did not authorize such suits.[18] This pressure, coupled with protests from foreign governments whose conduct was implicated in these lawsuits and increasing support for the corporate bar from the U.S. government, presented a challenge for foreign plaintiffs seeking to bring claims in U.S. courts.[19] In this context, U.S. courts began interpreting the ATS narrowly and restricting the grounds upon which plaintiffs could bring claims under the statute, particularly when their claims involved novel torts and defendants.[20]

C. *Four Possible Standards for Interpreting ATS*

Dodge lays out four possible standards that courts could use to determine whether a tort violating the law of nations is actionable.[21] The first standard interprets the ATS as permitting federal courts to create new law.[22] To date, no court has taken this route. Indeed, the Court in *Nestlé*, relying on the holding in *Sosa*, announced that the ATS cannot be interpreted to permit the judicial creation of a cause of action that goes beyond one of the three historical torts (violations of safe conduct, infringement on the rights of ambassadors, and piracy), unless the plaintiff can prove violation of a norm that is "specific, universal, and obligatory" under international law, which would then permit courts to exercise judicial discretion to create a cause of action.[23]

The second standard involves courts interpreting the plain language of the statute to reach all torts that are in violation of the law of nations.[24] A court may identify such a violation by examining international state practice that is in place due to a "sense of legal obligation."[25] The only court that has adopted this approach so far is the Eleventh Circuit in *Abebe-Jira v. Negewo*, which interpreted section 1350 of the

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18. Julian G. Ku, *The Third Wave: The Alien Tort Statute and the War on Terrorism*, 19 EMORY INT'L L. REV. 105, 110 (2005).

19. *Id.*

20. *Id.*; Dodge, *supra* note 7, at 358.

21. Dodge, *supra* note 7, at 352-353.

22. *Id.* at 352 (citing Lincoln Mills v. Textile Workers, 353 U.S. 488 (1957)).

23. Nestle USA, Inc. v. Doe, 141 S. Ct. 1931, 1938 (2021) (citing Sosa v. Alvarez, 542 U.S. 692, 724-26, 736, n. 27).

24. Dodge, *supra* note 7, at 352.

25. *Id.* at 352-353.

statute as "requiring no more than an allegation of a violation of the law of nations."[26]

The third standard is a much narrower reading of the statute, limiting claims to those that are "universal, definable, and obligatory."[27] This is the reading most courts have favored, and it has its basis in a 1981 Harvard Law Review article written in defense of the *Filártiga* decision.[28] The article sought to limit the decision's scope to torts that were "definable and identifiable as a tort committed by individuals, textually obligatory, and universal, so that derogations are not defended as exercises of legitimate political diversity."[29] The Northern District Court of California adopted this usage as its standard in *Forti v. Suarez-Mason*,[30] extending beyond the traditional definition of customary law, defining a "universal" practice more stringently than the *Restatement (Third) of Foreign Relations Law*, which requires merely that the practice be "general and consistent."[31] Under *Forti*, however, the practice must in fact be "universal."[32] Finally, the fourth standard that Dodge lays out is another narrow reading that would limit actionable claims to those that violate *jus cogens* norms.[33]

D. *Defining "Law of Nations"*

Before diving into any of these standards individually, it is helpful to understand how U.S. courts interpret the phrase "law of nations." When the First Congress enacted the Alien Tort Statute in 1789, William Blackstone, an English jurist whose *Commentaries on the Laws of*

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26. Abebe-Jira v. Negewo, 72 F.3d 844, 847 (11th Cir. 1996).

27. Dodge, *supra* note 7, at 353 (quoting Forti v. Suarez-Mason, 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987)) ("This 'international tort' must be one which is definable, obligatory (rather than hortatory), and universally condemned.").

28. Filártiga v. Peña-Irala, 630 F. 2d 876, 880 (2d Cir. 1980) ("When examining the law of nations to determine whether there was a violation under the Alien Tort Statute Act, the court can consider the customs and practices of nations, 'judicial decisions acknowledging and enforcing the law,' and the writing of jurists and commentators.").

29. Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after* Filártiga v. Peña-Irala, 22 HARV. INT'L L.J. 53, 88-9 (1981).

30. Forti v. Suarez-Mason, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987).

31. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §102(2) (AM. LAW INST. 1987).

32. Forti, 672 F. Supp. at 1540.

33. *Jus cogens* norms are "rules of international law [that] are recognized by the international community of states as peremptory, permitting no derogation." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 31, § 102 cmt. k.

England largely influenced the foundation of American law,[34] defined the term as a "system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world."[35] Supreme Court Justice Joseph Story added that this definition encompassed any doctrine that could be deduced by "correct reasoning" according to the rights, duties and moral obligations of nations.[36] Dodge relies on this definition to argue that courts should have the volition to ascertain what constitutes the law of nations, regardless of state practice.[37] However, modern courts have been hesitant to take this interpretation.[38]

According to the *Restatement (Third)*, customary international law derives from the "general and consistent practice of states" that they follow due to a "sense of legal obligation."[39] This sense of legal obligation is what is defined in the international law community as *opinio juris*, and may be inferred from acts or omissions.[40] Even if courts were to take this narrower perception that the law of nations should be confined to obligations derived from state practice, Dodge argues that "the text of the Alien Tort Statute suggests that jurisdiction should extend to torts in violation of *any* such obligation."[41] Similarly, the Eleventh Circuit has interpreted the Alien Tort Statute to require "no more than an allegation of a violation of the law of nations."[42]

E. *Trend for U.S. Courts*

Instead of adopting a broader approach under which courts have the autonomy to determine what constitutes the "law of nations," courts have typically limited claims under the Alien Tort Statute to those that are "universal, definable, and obligatory."[43] Dodge takes a textualist approach to this interpretation, arguing that it cannot be justified based off of the wording of the statute itself.[44] Indeed, the statute

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34. Albert S. Miles, David L. Dagley & Christina H. Yau, *Blackstone and His American Legacy*, 5 AUSTL. & N.Z.J.L. & POL. 46, 46 (2000).

35. 4 WILLIAM BLACKSTONE, COMMENTARIES *66.

36. United States v. The Da Jeune Eugenie, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551), *overruled on other grounds*, 23 U.S. (10 Wheat.) 66 (1825).

37. Dodge, *supra* note 7, at 353.

38. *Id.* at 354.

39. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 31, at § 102(2).

40. *Id.*

41. Dodge, *supra* note 7, at 353.

42. *Id.* (quoting Abebe-Jira v. Negewo, 72 F.3d 844, 847 (11th Cir. 1996)).

43. Forti v. Suarez-Mason, 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987).

44. Dodge, *supra* note 7, at 358.

does not include the words "universal, definable, and obligatory" in any form. Rather, the First Congress enacted a law that extended jurisdiction to "*all* causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[45] From this textualist reading, it appears that courts have deviated from the statute's original purpose by narrowly defining actionable claims.

Some courts have recently adopted even narrower interpretations of the ATS, requiring not only that the violated rule be "universal, definable, and obligatory," but also that it constitute a *jus cogens* norm.[46] *Jus cogens* norms are "rules of international law [that] are recognized by the international community of states as peremptory, permitting no derogation."[47] Dodge argues that this "judicially-imposed" approach is unjustified and not supported by the ATS from either a textualist standpoint or purposivist approach.[48] The textualist argument, as stated above, focuses on the phrase "*all* causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[49] Additionally, no separate category for *jus cogens* had been recognized by the law of nations at the time the statute was passed in 1789.[50] Furthermore, from a purposivist perspective, certain torts, such as assaults on ambassadors, which were considered violations of the

45. Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789) (emphasis added).

46. Dodge, *supra* note 7, at 356.

47. *Id.* at 355 (citing first to RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 31, at § 102(2)). Dodge also cites Doe I v. Unocal Corp., 110 F. Supp. 2d 1294, 1304 (C.D. Cal. 2000) ("While the Ninth Circuit has not expressly held that only *jus cogens* norms are actionable, the Circuit's holding in *Estate II* that actionable violations are only those that are specific, universal, and obligatory is consistent with this interpretation."); Nat'l Coalition Gov't of the Union of Burma v. Unocal, Inc., 176 F.R.D. 329, 345 (C.D. Cal. 1997) (holding that expropriation under the ATS was not actionable as it did not "constitute a *jus cogens* violation of the law of nations"); and Xuncax v. Gramajo, 886 F. Supp. 162, 184-89 (D. Mass. 1995) (discussing the claims of the plaintiffs under the heading "Peremptory Norms of International Law").

48. Dodge, *supra* note 7, at 358.

49. *Id.* at 358 (citing the Judiciary Act, ch. 20, *supra* note 45, at §9, 1 Stat. 73, 77).

50. *Id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 31, at § 102) ("The concept of *jus cogens* is of relatively recent origin."). Dodge also cites Egon Schwelb, *Some Aspects of International* Jus Cogens *as Formulated by the International Law Commission*, 61 AM. J. INT'L L. 946, 949 (1967) (asserting that writing on the topic of *jus cogens* has been "theoretical statements" by authors but has not been "substantiated by references to rulings or international courts or tribunals, to less authoritative state practice, or to diplomatic proceedings or correspondence").

law of nations at the time of the statute's enactment, are arguably not considered to be violations today.[51]

Dodge suggests that as more plaintiffs seek to extend the statute's reach to encompass new torts and types of defendants, judges will become more restrictive and limiting in their interpretation of the statute.[52] In *Tel Oren v. Libyan Arab Republic*, for example, plaintiffs brought claims of torture and terrorism against the Palestinian Liberation Organization, asking the court to extend the prohibition against torture to a non-state actor and to recognize terrorism as a violation of the law of nations.[53] In response, the court emphasized the "extremely narrow scope" of the Alien Tort Statute, dismissing plaintiffs' claims.[54] Similarly, in *Forti v. Suarez-Mason*, which established the "universal, definable, and obligatory" standard, the plaintiff sought the court's recognition of cruel, inhuman, or degrading treatment and causing one's disappearance, as customary international law violations.[55] While the district court found that the plaintiffs had met their burden for showing an international consensus for the international tort of "causing disappearance," it conversely found that they were unable to establish an international consensus for what conduct constitutes "cruel, inhuman or degrading treatment," and thus dismissed the case, holding that the alleged tort did not fall under the Alien Tort Statute.[56] More recently, in *Doe I. v. Unocal Corporation*, the plaintiff asked the Central District Court of California to recognize forced labor as a violation of the law of nations and to enforce that law against a domestic corporation.[57] The court ultimately chose to dismiss the complaint, stating the plaintiff was unable to prove that the court had jurisdiction over Total S.A., the foreign defendant in this case.[58] Through the these case holdings, Dodge illustrates the pattern of uncertainty that courts have when dealing with torts that deviate from those recognized under prototypical

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51. Dodge, *supra* note 7, at 358 (quoting from RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 31, at § 102 reporters' n. 6 (1987)) ("[*Jus cogens*] norms might include rules prohibiting genocide, slave trade and slavery, apartheid and other gross violations of human rights, and *perhaps* attacks on diplomats.") (emphasis added by Dodge).

52. Dodge, *supra* note 7, at 358.

53. *Id.* at 358-59 (citing Tel Oren v. Libyan Arab Republic, 726 F.2d 774, 796 (D.C. Cir. 1984)).

54. *Tel Oren*, 726 F.2d at 781.

55. Forti v. Suarez-Mason, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987).

56. *Id.* at 1543.

57. Doe I. v. Unocal Corporation, 110 F. Supp. 2d 1294, 1304, 1307-10 (C.D. Cal. 2000).

58. *Id.* at 1311-1312.

torture cases, such as *Filártiga*, thus resulting in their inclination to narrow the standard further.[59]

F. *Dodge's Argument*

Dodge insists that, judicial uncertainty aside, the soundest standard that would comply with both the Congressional and textual purposes of the Alien Tort Statute would be to view it as extending jurisdiction to courts over all torts in violation of customary international law, without requiring that they be *jus cogens* or otherwise "universal, definable, and obligatory."[60] Such a Congressional purpose appears in the Torture Victim Protection Act of 1991, which extended jurisdiction to include suits by U.S. citizens.[61] The House Report noted that the statute should "permit suits based on other norms that already exist or may ripen in the future into rules of customary international law."[62] Similarly, the Alien Tort Statute should also be adaptive to changes in customary law by permitting suits to be brought in violation of those rules.[63]

G. *The "Third Wave" of ATS Cases*

Dodge wrote his article on the heels of the "second wave" of ATS cases, when it was clear that courts had begun narrowly interpreting the statute, especially with the increasing number of law suits against corporations.[64] Professor Julian Ku of Hofstra University School of Law has since discussed a "third wave" of claims which have arisen in light of the U.S. government's war on terror.[65] Ku suggests that the focus of this new era of ATS claims has shifted to the actions of the U.S. government.[66]

A landmark third-wave case, *Sosa v. Alvarez-Machain*, had as its central issue the question of whether the ATS merely provided jurisdiction federal courts for claims that violated the law of nations, or whether it also provided a private cause of action to foreign plaintiffs.[67]

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59. Dodge, *supra* note 7, at 359.

60. *Id.*

61. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

62. H.R. REP. NO. 102-367, at 3-4 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 84, 86.

63. Dodge, *supra* note 7, at 359.

64. Ku, *supra* note 18.

65. *Id.* at 106, 110-14.

66. *Id.* at 110.

67. *Id.* at 114 (citing Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2761 (2004)) ("The ATS 'is a jurisdictional statute'").

The Court found that the statute only granted jurisdiction to federal courts and held that federal courts could hear but a few categories of such suits, given the limited recognition of traditional international law violations under federal common law at the time of the ATS enactment.[68] While the Court's holding did expand the reach of the statute by declaring that it could in some circumstances allow for causes of action, the Court still maintained the narrow interpretation of the statute's scope by holding that the claims brought must be actual violations of international that are "specific, universal, and obligatory."[69] Specifically, the "modest number of international law violations" that would grant personal liability under the ATS include "offenses against ambassadors, violation of safe conducts, and piracy."[70]

Following the Court's decision in *Sosa*, courts deciding ATS cases have applied this narrowed standard. In 2013, the Court added to this narrowing of the standard in *Kiobel v. Royal Dutch Petroleum Co.*, holding not only that the alleged tort must be one of the three historical torts listed in *Sosa*, but also that the ATS must have "domestic application," to the extent that the alleged tort must concern the United States with "sufficient force to displace the presumption against extraterritorial application."[71] The Court further asserted that "mere corporate presence is not enough."[72] These two standards further narrow the scope of the statute's reach, proving Dodge's hypothesis that U.S. courts prefer to narrowly read the ATS so as to avoid granting too much leeway for foreign plaintiffs to bring claims before U.S. courts.

III. NESTLÉ AND TODAY'S STANDARD

A. *Nestlé Case Facts*

This trend towards narrower standards helps explain the Court's 2021 holding in the *Nestlé* case. The facts of the case are as follows.

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68. *Sosa*, 124 S. Ct. at 2761 ("The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.").

69. *Id.* at 2766.

70. *Id.* at 2758.

71. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct, 1659, 1669 (2013); *see also* Morrison v. National Australia Bank Ltd., 561 U.S. 247 (2010) (holding that the presumption against extraterritoriality applies to claims brought under the Alien Tort Statute Act).

72. *Kiobel*, 133 S. Ct. at 1669.

Six individuals from Mali alleged that they were trafficked into the Ivory Coast as child slaves to produce cocoa.[73] While neither of the named defendants, Nestlé nor Cargill, own or operate any of the cocoa farms on the Ivory Coast, they do buy cocoa from these farms, along with providing them with technical and financial resources including training, fertilizer, tools, and cash, all in exchange for the exclusive right to purchase cocoa from these farms.[74] As such, the respondents sued Nestlé, Cargill, and other defendant corporations under the Alien Tort Statute, alleging that this corporate activity equated to aiding and abetting child slavery.[75] Specifically, they claimed that the defendant companies were aware, or should have been aware, that the farms were exploiting enslaved children and that the defendant companies did not use the "economic leverage" they held over these farms to coerce them to eliminate such exploitation. [76] With these allegations, the plaintiffs contended that because all major operational decisions of the defendant corporations were made within the United States, they could bring these claims to U.S. federal court.[77]

The district court initially dismissed the case as an impermissible extraterritorial application of the ATS, relying on *Kiobel*.[78] However, the Ninth Circuit found it relevant that the respondents pleaded a domestic application of the ATS (as required under *Kiobel*), and held that since the corporations' major operational decisions were based in the United States, plaintiffs had met *Kiobel*'s requirements.[79] The case then reached the Supreme Court, with oral arguments held in the summer of 2021. Following the hearing, the Court reversed the Ninth Circuit and ruled in favor of the defendant companies.

B. *Nestlé Court Holding and Reasoning*

Applying the standards laid out in *Kiobel* and *Sosa*, the Court found that the human trafficking and child slavery claims brought by the plaintiffs did not meet the necessary requirements under the ATS.[80] The Court's holding was two-fold: first, the claim did not have sufficient domestic application, as the alleged conduct took place outside of the United States and did not constitute more than *Kiobel*'s "mere

73. Nestle USA, Inc. v. Doe, 141 S. Ct. 1931, 1935 (2021).
74. *Id.* at 1933.
75. *Id.* at 1935.
76. *Id.*
77. *Id.*
78. Doe v. Nestle, S.A., 748 F. Supp. 2d 1057 (C.D. Cal. 2010).
79. Doe v. Nestle, S.A., 906 F.3d 1120 (9th Cir. 2018).
80. *Nestle USA, Inc.*, 141 S. Ct., at 1936-37.

corporate presence" standard.[81] Additionally, the alleged act did not fall under the three historical torts established in *Sosa*, and the Court leaves the authority to establish ATS liability for torts not on this list to Congress.[82] As such, the Court found that the Ninth Circuit erred in allowing respondents to seek a judicially created cause of action to recover damages from American companies for aiding and abetting in slavery committed abroad and where all injuries occurred overseas.[83] Additionally, the Court held that general corporate activity, including corporate presence, does not provide a sufficient connection between the crime alleged by plaintiffs and the domestic corporate conduct.

i. The Court's Applied Standard

In order to determine whether the ATS had extraterritorial application over plaintiffs' claims, the Court applied the standard typically used by U.S. federal courts, a two-step approach established in *RJR Nabisco Inc.*[84] The first step of this framework is to apply the presumption that all statutes apply only on a domestic level.[85] Following this, the Court must inquire into whether the statute in question gives a clear, affirmative indication that would rebut this presumption.[86] Deferring to the precedent set by *Sosa*, the Court held that there was "sound reason" for Congress to doubt judicial creation of a cause of action that permitted domestic application, that extended beyond the three historical torts.[87] By applying *Sosa*'s narrowed scope to the ATS (i.e., Dodge's "third standard"), the Court has continued to follow the general trend among most U.S. courts.[88]

After reasoning that the plaintiffs' allegations could not meet the first step's requirements, the Court moved to the second step of the framework, which permits domestic application of the statute even when the statute does not apply extraterritorially as long as plaintiffs are able to establish that the alleged conduct took place in the United States.[89] However, because in this case the alleged conduct all took place abroad, the Court found that the standard under *Nabisco* could

81. *Id.*

82. *Id.* at 1937.

83. *Id.*

84. *Id.* at 1936 (citing RJR Nabisco Inc. v. European Community, 579 U.S. 325, 337 (2016)).

85. *RJR Nabisco Inc.*, 579 U.S. at 227.

86. *Id.*

87. *Nestle USA, Inc.*, 141 S. Ct. at 1939.

88. Dodge, *supra* note 7, at 353-54.

89. *RJR Nabisco Inc.,* 579 U.S. at 337.

not be met here.[90] Specifically, the Court noted that the only alleged activity that took placed in the United States, operational decision-making, constituted "general corporate activity" which alone cannot establish a domestic application of the ATS.[91]

Finally, the Court touched on Dodge's first standard when it discussed the possibility of creating a new cause of action under the ATS. Ultimately, the Court rejected this tact on the basis that creating a cause of action enforcing international law beyond the three historical torts would invariably give rise to foreign policy concerns, as well as possibly violating separation of powers norms.[92]

Although the *Nestlé* decision was clearly in line with over a decade of precedent that has narrowed the understanding of what claims can be brought before U.S. federal courts under the ATS, given the horrific nature of the alleged crimes and an increased concern over the fairness of corporate sourcing of products,[93] this decision has caused much debate and frustration over the Court's stance.[94]

IV. FUTURE IMPLICATIONS OF *NESTLÉ* HOLDING

A. *Implications for Corporate Liability*

Because the Court decided *Nestlé* on procedural grounds, the possibility of future corporate liability in similar cases in the future remains open. While on the one hand this may be viewed as a "win" for corporations, as the Court has not yet ruled on the merits of corporate

90. *Nestle USA, Inc.*, 141 S. Ct. at 1936-37.

91. *Id.* at 1937.

92. *Id.* at 1938-39 (citing Jesner v. Arab Bank, 138 S. Ct. 1386 (finding that foreign policy concerns were a valid reason to not create a cause of action under the ATS)).

93. *See Assessing Progress in Reducing Child Labor in Cocoa Growing Areas of Côte d'Ivoire and Ghana*, NORC, https://www.norc.org/Research/Projects/Pages/assessing-progress-in-reducing-child-labor-in-cocoa-growing-areas-of-c%C3%B4te-d%E2%80%99ivoire-and-ghana.aspx (last visited Feb. 4, 2022) (summarizing the findings of a survey conducted by NORC to assess the effectiveness of interventions to reduce child labor as well as to assess the worst forms of child labor used in Côte d'Ivoire and Ghana); *Campaign for Fair Chocolate – Cocoa Production in a Nutshell*, MAKE CHOCOLATE FAIR, https://makechocolatefair.org/issues/cocoa-production-nutshell (last visited Feb. 4, 2022) (campaigning to make the sourcing of chocolate more sustainable from countries such as the Ivory Coast and Ghana).

94. *See* Sophia Ahmed, *Inside the 14-Year Long Legal Battle Between Nestlé and Six Former Forced Laborers,* COLUM. UNDERGRADUATE L. REV.: ONLINE J. (Apr. 15, 2019), https://www.culawreview.org/journal/inside-the-14-year-long-legal-battle-between-nestl-and-six-former-forced-laborers (stating that this case others show the limitation in judicial power to regulate forced labor, thereby leaving it up to corporate, governmental, and civilian stakeholders and supply chains to play a greater role in taking action against the use of forced labor).

liability in such cases, *Nestlé* has also set a clearer path for future plaintiffs to bring ATS claims in federal court. Additionally, given that this decision follows a long line of cases in which U.S. courts have refrained from creating causes of action, even in the face of allegations of serious human rights violations,[95] the backlash to this decision may put added pressure on Congress to finally expand the statute. Finally, a major concern for corporations is the satisfaction of significant stakeholders, including customers and shareholders. As such, U.S. corporations may face increased pressure from these stakeholders to tighten standards and increase supply chain monitoring. All told, these positive circumstances could put U.S. corporations at risk of not only being defendants in such cases more frequently, but also of actually being held responsible for their contributions to human rights abuses.

B. *Judicial and Legislative Implications*

Nestlé is one in a long line of court decisions that have interpreted the ATS as narrowly as possible and represents the clear trend that U.S. courts have opted to avoid deciding such matters on substantive grounds, instead protecting domestic actors and evading findings of violations of international law by relying on the presumption of extraterritoriality.[96]

Considering the implications the *Nestlé* decision could have on corporations with vast global supply chains, could this case then provide the impetus needed for Congress to consider expanding the Alien Tort Statute? The three historical torts, i.e., violation of safe conduct, infringement on the rights of ambassadors, and piracy, do not begin to encompass the vast array of customary international law norms that

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95. *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (holding that under ATS's "narrow scope" the violation must be "universal, definable, and obligatory," where plaintiff had asked for prohibition of torture to be extended to non-state actors and for terrorism to be recognized as violation of the law of nations); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987) (finding that plaintiffs met their burden for showing an international consensus for the international tort of "causing disappearance" but were unable to establish an international consensus for what conduct constitutes "cruel, inhuman or degrading treatment"); Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1304 (C.D. Cal. 2000); Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2761 (2004) (plaintiff asked the court to recognize forced labor as a violation of the law of nations and to enforce that law against a domestic corporation; dismissing complaint because plaintiff was unable to prove that the court had personal jurisdiction over corporate foreign defendant).

96. This interpretation is consistent with Dodge's assertion that the U.S. government became more active in its support of the corporate defense bar when the second wave of ATS claims began threatening U.S. corporations. *See* Dodge, *supra* note 7, at 351-52.

comprise the "law of nations."[97] Furthermore, given that the First Congress seemingly intended for the statute to incorporate *any* violation of the law of nations, the same textualist argument that the Court used in *Nestlé* to avoid making a substantive ruling under the statute may in fact militate *in favor* of making substantive rulings. That is to say, by relying on a broad understanding of the First Congress' intent, Congress today should expand the statute to incorporate all modern violations of customary international law and international treaties, ensuring that corporations like Nestlé will no longer be able to evade liability for wrongdoings committed overseas.

97. *Id.* at 352-353.